SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD Justice PART 61

LEONARD ELLERBE,

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK and NEW JERSEY, *et al.*,

Defendants.

INDEX NO. 106395/2009

MOTION DATE Nov. 29, 2010

MOTION SEQ. NO. 001

MOTION CAL. NO. ____

2/16/11 EC

The following papers, numbered 1 to 8 were read on this motion for partial summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-7
Replying Affidavits	8

Cross-Motion: [ ] Yes [✓] No

Upon the foregoing papers, plaintiff's motion for partial summary judgment in his favor on his Labor Law § 240 (1) claim is decided in accordance with the accompanying decision and order.

Dated: 2/14/11

O. P. Sherwood
O. PETER SHERWOOD, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: [ ] FINAL DISPOSITION [✓] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

[ ] SUBMIT ORDER/ JUDG. [ ] SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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LEONARD ELLERBE,

Plaintiff,

-against-

DECISION AND ORDER

Index No. 106395/2009

THE PORT AUTHORITY OF NEW YORK and NEW JERSEY, BOVIS LEND LEASE, LMB and PHOENIX CONSTRUCTORS, JOINT VENTURE,

Defendants.

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O. PETER SHERWOOD, J.:

In an action to recover damages for personal injuries upon, *inter alia,* an alleged violation of New York Labor Law § 240 (1), plaintiff moves, pursuant to CPLR § 3212, for partial summary judgment against defendants The Port Authority of New York and New Jersey (the "Port Authority") and Bovis Lend Lease, LMB ("Bovis") on the issue of liability under Labor Law § 240 (1).

Background

On December 8, 2008, the date of the accident at issue, plaintiff, a journeyman ironworker employed by non-party Cornell Steel ("Cornell"), was working as a member of a decking crew on the erection of what was then called the World Trade Center Memorial, and which is now called the National September 11th Memorial and Museum, still under construction, in Manhattan. The unfinished memorial is to consist of an eight-acre plaza containing a museum, as well as two massive pools where the twin towers once stood, with 30-foot waterfalls and the names of victims inscribed on parapets surrounding the pools. Bovis is the general contractor on the project, and the Port Authority owns the property.

Plaintiff's accident took place at approximately 7:30 A.M., as he was ascending an extension ladder in order to reach a top-derrick floor level, where he was going to "spread deck," or lay floor beams (Plaintiff's Deposition, at 29-30, annexed as Exhibit "3" to Affirmation of David H. Mayer, Esq. in Support of Motion [Mayer Affirm.]). As he was trying to transfer from the ladder to the derrick floor, plaintiff slipped and fell 21 feet, sustaining injuries to various parts of his body, including his feet, which he initially landed on, before falling onto his side (*id.* at 65-69). As he

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shifted his weight to transfer to the floor, plaintiff testified that the left side of the ladder swung back, or reared, causing him to lose his balance and fall to the floor below (*id.*).

Both plaintiff and Bovis's site safety manager, Omar Jackson ("Jackson"), testified that the ladder was tied or secured to the derrick floor on the upper-right side of the ladder, but that the upper-left and bottom portions of the ladder were not tied to anything (Plaintiff's Deposition, at 72; Jackson Deposition, at 61, annexed as Exhibit "2" to Mayer Affirm.). Jackson testified that while the ladder was not tied to anything on the bottom, its feet were "shoved between the corrugated decking" (Jackson Deposition, at 61).

Jackson testified further that it was Bovis's policy to use stair towers on the project, instead of extension ladders, as access points between floors, in order "to promote fall prevention," as "[i]t's safer to access a stair tower from one elevation to the other as opposed to a ladder" (*id.* at 66). However, Jackson testified that it was Cornell's responsibility to build the stairs, and "Cornell didn't supply the stair towers as expeditiously as they were supposed to" (*id.* at 64). At the time of his fall, plaintiff was wearing a harness and lanyard, but no testimony has been submitted as to whether plaintiff had hooked the lanyard to anything (Plaintiff's Deposition, at 146-147).

Plaintiff testified that his foreman, Brendan McShane ("McShane"), witnessed his accident (*id.* at 71), but no deposition testimony or affidavit from McShane is submitted with the motion. Plaintiff does submit an incident report created by Bovis, which lists McShane as a witness, and briefly describes the accident without reference to any ladder movement, indicating that plaintiff fell after he "lost his footing" (Incident Report, at 1 annexed to Mayer Affirm. as Exhibit "4").

Plaintiff's complaint alleges that the Port Authority, Bovis, and defendant Phoenix Constructors, Joint Venture ("Phoenix") are liable to him pursuant to common-law negligence, as well as Labor Law §§ 200, 240 (1) and 241 (6).

Plaintiff, in an affirmation from counsel, withdraws all claims against Phoenix, as it was brought into the action mistakenly (*see* Mayer Affirm.¶ 4). In support of his motion for partial summary judgment against the Port Authority and Bovis on the issue of their liability under Labor Law § 240 (1), plaintiff contends that he has made a prima facie showing of entitlement to judgment as a matter of law by submitting evidence that the ladder was insufficient to protect him from his fall.

In a joint opposition, the Port Authority and Bovis submit an affidavit from Jackson, Bovis's site safety officer. Jackson, who did not witness the accident, but heard it from the floor below and came to the scene while plaintiff was still lying on the floor, states in his affidavit that, while he was still with plaintiff, he "observed that the feet of the ladder remained wedged into the corrugated decking where they were placed to secure it" (Jackson Affidavit, ¶¶ 8-9). Based on this observation, Jackson concludes that "[t]he ladder could not have moved or swung as [plaintiff] now claims" and that "[i]f the ladder did move or swing, the bottom feet of the ladder would have had to come out of the cells and would have been noticeable upon my inspection" (*id.*, ¶¶ 15-16). In addition, Jackson states that "the use of ladders as access was safe as long as the ladders were properly secured," and that "it is normal practice to tie only one side of a ladder to a post" (*id.*, ¶¶ 3, 12).

The Port Authority and Bovis also submit an affidavit from John Coniglio ("Coniglio"), a construction safety consultant, who reviewed the depositions of plaintiff and Jackson and concluded that "the ladder was in fact properly secured" and that "[w]hile [plaintiff] indicated that the ladder 'reared back on me' there is no explanation for the ladder movement other than his own personal use and method of exiting the ladder." Coniglio does not expound on what plaintiff did or failed to do which caused his accident.

Relying on the affidavits of Jackson and Coniglio, the Port Authority and Bovis argue that there are issues of fact precluding summary judgment with respect to whether the ladder provided proper protection to plaintiff and whether plaintiff was the sole proximate cause of his own injury.

In reply, plaintiff argues that Jackson's affidavit should be disregarded, as it is inconsistent with his deposition testimony. With respect to the construction safety consultant's affidavit, plaintiff argues that Coniglio, in concluding that plaintiff was the sole proximate cause of his own accident, fails to suggest what plaintiff may have done wrong while attempting to transfer from the ladder to the derrick floor.

Plaintiff further contends that defendants have failed to come forward with any evidence which would create an issue of fact as to whether he was the sole proximate cause of his accident. In further support of his argument that the extension ladder was inadequate to provide safe access between floors, plaintiff refers to 12 NYCRR 23-1.21 (b) (4) (iv), which provides, in relevant part:

> When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.

Plaintiff concludes, without elaborating, that defendants violated this Industrial Code rule.[1]

Discussion

Preliminarily, the court addresses plaintiff's contention that the affidavit of Bovis's site safety manager, Jackson, should be disregarded. The Appellate Division, First Department has frequently held that "[a] party's affidavit that contradicts [his or] her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (*Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [1st Dept 2007], quoting *Harty v Lenci,* 294 AD2d 296, 298 [1st Dept 2002]).

Here, Jackson's affidavit only arguably comes into conflict with his earlier deposition testimony when he states that the use of ladders as access between floors was safe as long as the ladders were properly secured. The statement, however, does not necessarily contradict his earlier testimony that it was Bovis's policy to use stair towers instead of ladders for access between floors, as safety is a matter of degree and Jackson might plausibly consider a practice safe while still considering an alternative safer. In any event, defendants are not relying on the arguably contradictory statement, as Coniglio, defendants' construction safety consultant, also states that using an extension ladder was safe under these circumstances (Coniglio Affidavit, ¶ 17). Therefore, the court will consider Jackson's affidavit in determining this motion.

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324

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[1] Plaintiff also suggests that the court should search the record, and, based on the alleged violation of this part of the Industrial Code, grant him partial summary judgment on the issue of defendants liability under Labor Law § 241 (6). The court declines the invitation, as defendants have not had an opportunity to argue this issue.

[1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "*regardless of the sufficiency of the opposing papers*" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Labor Law § 240 (1), entitled "Scaffolding and other devices for use of employees," provides, in relevant part:

> All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused plaintiff's injury (*see Bland v Manocherian*, 66 NY2d 452, 459 [1985]). While "[n]ot every worker who falls at a construction site ... gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]), the statute "is to be liberally construed" to accomplish its purpose of better protecting "workers engaged in certain dangerous employments" (*Sherman v Babylon Recycling Ctr.*, 218 AD2d 631, 631 [1st Dept 1995] [internal quotation marks and citation omitted]).

"It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)" (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004]; *see also Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004] [holding that "[g]iven an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"]). However, no violation of the statute is present where the ladder is properly secured and plaintiff "simply lost his footing" on a ladder "that did not malfunction" (*Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462 [1st Dept 2007] [internal citation omitted]).

In cases where a ladder malfunctions for reasons that are unclear while the worker is engaged in a protected activity, courts accord to plaintiffs a presumption that the ladder "was not good enough to afford proper protection" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n

8 [2003] [internal citations omitted]). However, once the plaintiff has made a prima facie showing, "the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence--enough to raise a fact question--that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident. If defendant's assertions in response fail to raise a fact question as to these issues, the plaintiff must be accorded summary judgment"(*id.* [internal citations omitted]).

Even if the ladder was secured, and did not malfunction, defendants may still be liable pursuant to Labor Law § 240 (1) if the ladder was "not an adequate safety device for the task [plaintiff] was performing" and this inadequacy proximately caused plaintiff's injuries (*Carino v Webster Place Assoc., LP*, 45 AD3d 351, 352 [1st Dept 2007] [holding that plaintiff was entitled to partial summary judgment on his Labor Law § 240 (1) claim because the ladder with which he was provided in order to remove an eight-foot-high fence at a construction site was inadequate for that task]; *see also Felker v Corning Inc.*, 90 NY2d 219, 224 [1997] [holding that, in the absence of allegations that the subject ladder was defective or improperly placed, partial summary judgment on the issue of liability under Labor Law § 240 (1) was appropriate, as the ladder was inadequate to protect plaintiff from falling over an eight-foot alcove wall he was required to reach over to carry out his work]).

Here, plaintiff was engaged in erecting a building, an activity protected by the statute, and he was clearly subject to a gravity-related risk as he accessed the derrick floor by means of an extension ladder. Plaintiff makes a prima facie showing that defendants violated the statute twice. First, plaintiff makes a prima facie showing that the ladder malfunctioned and proximately caused his injuries by submitting his own deposition, in which he testified that the ladder swung back as he dismounted it, thus causing him to fall to the ground. Second, plaintiff makes a prima facie showing that the ladder, without regard to whether it functioned properly, was inadequate to provide safe access between floors by submitting the affidavit of Bovis's site safety manager, Jackson, who testified that it was Bovis's policy to use stair towers as an access between floors because stair towers are safer for this purpose than extension ladders.

With regard to plaintiff's showing that the ladder was defective, under *Velasco* (8 AD3d 88, *supra*), if the ladder had been entirely unsecured, defendants would be unable to rebut with evidence

that plaintiff was the sole proximate cause of his injuries. However, since the subject ladder was at least partially secured by having been tied off on the upper-right side, defendants are entitled to rebut plaintiff's showing.

In order to rebut plaintiff's showing that the ladder defectively reared back, defendants submit the affidavit of Jackson, in which he states that the ladder could not have reared back in the way plaintiff described because he found the feet of the ladder jammed into the corrugated metal deck after the accident. Additionally, both plaintiff and defendants submit Bovis's incident report, in which plaintiff is described as having lost his footing without any reference to ladder movement or malfunction. As in *Buckley* (38 AD3d 461, *supra*), in which a similar note in an incident report was enough to warrant the denial of plaintiff's motion for partial summary judgment as to liability under Labor Law § 240 (1), this report, along with Jackson's testimony, creates a question of fact as to whether the statute was violated and whether plaintiff was the sole proximate cause of his accident. Thus, defendants have succeeded in rebutting plaintiff's first prima facie showing.

With respect to plaintiff's showing that the statute was violated because the ladder was inadequate to provide safe access between floors, the report of defendants' construction safety consultant, Coniglio, states that the use of extension ladder in these circumstances did not pose an unsafe condition. This is enough to create a question of fact as to whether the ladder provided adequate protection to plaintiff. As such, and as there is also a question of fact as to whether plaintiff was the sole proximate cause of his accident, defendants have rebutted plaintiff's prima facie showing that they violated the statute, and proximately caused his injuries, by providing him with a ladder, instead of a stair tower, to access the derrick floor.

Thus, plaintiff's motion for partial summary judgment against the Port Authority and Bovis on the issue of liability under Labor Law § 240 (1) must be denied.

Conclusion

Based upon the foregoing discussion, it is

ORDERED that plaintiff's motion for partial summary judgment against defendants The Port Authority of New York and New Jersey and Bovis Lend Lease, LMB on the issue of their liability under Labor Law § 240 (1) is denied; and it is further

ORDERED that plaintiff's claims as against defendant Phoenix Constructors, Joint Venture having been withdrawn by plaintiff are dismissed as against said defendant, and the Clerk is directed to enter judgment accordingly dismissing the action as against defendant Phoenix Contractors, Joint Venture; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption is hereby amended to reflect the dismissal and shall read as follows:

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LEONARD ELLERBE,

Index No. 106395/2009

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK and NEW JERSEY and BOVIS LEND LEASE LMB, INC.,

Defendants.

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and it is further

ORDERED that all future papers filed with the court shall bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

This shall constitute the decision and order of the court.

DATED: 2/14/11

ENTER,

O. P. Sherwood

O. PETER SHERWOOD
J.S.C.